WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
December 2004

This calendar contains cases that originated in the following counties:
Barron
Brown
Dane
Dunn
Kenosha
Marathon
Milwaukee
Rock
Trempealeau
Walworth

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

MONDAY, DECEMBER 6, 2004

10:30 a.m.	03-1253-CR	State v. Michael A. DeLain
1:30 p.m.	01-1345-CR	State v. Paul J. Stuart
2:30 p.m.	01-3105	Lamar Central Outdoor v. Board of Zoning Appeals

TUESDAY, DECEMBER 7, 2004

9:45 a.m.	03-1463-CR	State v. Jose A. Trujillo
10:45 a.m.	03-1533-CR	State v. David S. Stenklyft
1:30 p.m.	03-1276-CR	State v. James Hubert Tucker, Jr.

MONDAY, DECEMBER 13, 2004

10:30 a.m.	03-1880	Anthony R. Anderson v. MSI Preferred Ins.
1:30 p.m.	03-0327	John D. Hess v. Juan Fernandez III
2:30 p.m.	03-1419	State v. Richard A. Brown

TUESDAY, DECEMBER 14, 2004

9:45 a.m.	03-0979-FT	Gary J. Howell v. Orrin Denomie
10:45 a.m.	03-2027	Klover E. Lagerstrom v. Myrtle Werth Hospital
1:30 p.m.	03-0862	Raul J. Walters v. National Properties, LLC

In addition to the cases listed above, the court will consider and determine on briefs, without oral argument, the following cases:

02-3327-D In the Matter of Disciplinary Proceedings Against David C. Williams: OLR v. David C. Williams (Williams is a Lake Geneva lawyer)

02-3238-D In the Matter of Disciplinary Proceedings Against Michael J. Backes: OLR v. Michael J. Backes (Backes is a Milwaukee lawyer)

WISCONSIN SUPREME COURT
MONDAY, DECEMBER 6, 2004
10:30 a.m.

03-1253-CR State v. Michael A. DeLain

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a conviction in Brown County Circuit Court, Judge Richard J. Dietz presiding.

This case involves a teenage girl who wore a wire to a counseling session to help police gather evidence that the therapist was sexually assaulting her. The question before the Supreme Court is whether the session that was secretly video- and audio-taped counts as an actual therapy session for purposes of charging the therapist with the crime of sexual assaulting a patient, or whether the fact that the girl was secretly acting as a police agent effectively undid the therapist-patient relationship.

Here is the background: Michael A. DeLain, Ph.D., was a psychologist in the Green Bay area who opened a private clinical practice focusing on child and adolescent therapy in 1990. He made use of a method called "provocative therapy" that supposedly builds self-esteem by provoking the patient with negative comments in order to encourage the person to defend his/herself.

In 2001, a 16-year-old girl sought counseling from him to address some problems she was having with her father and her boyfriend. After the third session, on April 25, 2001, the girl refused to go back to DeLain and told her family that DeLain had sexually assaulted her. That evening, the girl and her family went to the police, who suggested that the girl return for another meeting with DeLain and secretly record it on video and audiotape. On May 2, 2001, she did this. The tape showed verbal exchanges that the prosecutor and a psychologist called by the State as an expert witness would later, at trial, label inappropriate. DeLain, on the other hand, said the exchanges were an acceptable use of the provocative therapy technique.

The State charged DeLain with two counts of sexual abuse by a therapist, one count of sexual intercourse with a child 16 or older, and one count of obstructing justice, and the case went to a jury trial.

At trial, the girl gave detailed testimony about a series of assaults. DeLain's defense was that the girl made up the assaults to retaliate against him for having told her at the April 25 session that he would have to report her adult boyfriend, with whom she was sexually active, to authorities. He also presented evidence that he had spoken with professional colleagues about the difficulty of making such a report and that he had, on May 3, 2001 (nine days after the session in which the conversation about DeLain's responsibility to report the boyfriend allegedly occurred) made a call to social services about the boyfriend. DeLain alleges that he did not, on May 3, know that the May 2 session had been secretly taped.

On March 7, 2002, the jury acquitted DeLain of the sexual intercourse charge and convicted him on the other three counts. He was given a sentence that meant he would serve two years in prison.

DeLain filed a motion seeking a new trial and arguing that his attorney had been ineffective for failing to call various people as witnesses, including a Madison psychologist who originated the provocative therapy technique. The trial judge denied DeLain's motion and DeLain went to the Court of Appeals, where he argued that he could not be convicted of crimes arising from the secretly taped session because it was a set-up rather than a true counseling session. The Court of Appeals rejected this argument, concluding that as long as DeLain *thought* the girl was there as a patient, the therapist-patient relationship existed.

The Supreme Court will decide whether DeLain should receive a new trial.

WISCONSIN SUPREME COURT

MONDAY, DECEMBER 6, 2004
1:30 p.m.

01-1345-CR State v. Paul J. Stuart

This is the third time this case has come before the Wisconsin Supreme Court. In 2003, the Court took another look at a decision it made in 1999; now, the Court is revisiting its 2003 decision. This case originated in Kenosha County Circuit Court, Judge Michael Fisher presiding.

In this case, the Supreme Court will decide whether a Kenosha man should receive a new trial in light of a recent ruling of the U.S. Supreme Court.

Here is the background: Paul J. Stuart was charged with first-degree intentional homicide. During the trial, Paul's brother John invoked his Fifth Amendment right against self-incrimination and refused to testify. John had testified at the preliminary hearing that Paul had confessed the shooting. The State wanted to read that testimony to the jury but the judge would not permit it because Paul's lawyer was unable to cross-examine John. The State appealed this ruling to the Court of Appeals, which affirmed the trial court. The State then made an emergency appeal to the Supreme Court, which reversed the lower courts on a 4-3 vote. Based upon the Supreme Court's order, issued Feb. 23, 1999, John's testimony from the preliminary hearing was read to the jury. Paul was convicted and sentenced to life in prison with a parole eligibility date of 2029.

Paul again appealed, arguing that it was unfair for the jury to have heard his brother's testimony. The Court of Appeals declined to rule on Paul's appeal, indicating that it was uncertain whether the Supreme Court's 1999 order allowing the testimony constituted the "law of the case." The law of the case doctrine says that an appellate court ruling in a case is to be followed in any future proceedings in that case unless the facts of the case change.

The Court of Appeals asked the Supreme Court to clarify whether its Feb. 23, 1999 order – which was very short and did not contain legal reasoning – constituted the law of the case, or whether the underlying question of whether Paul should get a new trial could be considered. The Supreme Court in 2003 declared, on a 5-2 vote, that the 1999 ruling did establish the law of the case, and that Stuart's conviction would stand.

Then, in 2004, the U.S. Supreme Court issued a decision[1] in a criminal case from the state of Washington that involved a defendant who was tried for assault and attempted murder. The defendant challenged the use of statements that his wife had made to police. The wife, citing marital privilege, did not testify at the trial. The trial court permitted prosecutors to enter her statements into evidence and the Washington Supreme Court upheld this ruling. The U.S. Supreme Court, however, unanimously overturned the man's conviction, concluding that the right to a fair trial demands that the defendant be able to confront his/her accuser.

The Wisconsin Supreme Court will now, in light of this U.S. Supreme Court ruling, take another look at Stuart's case.

[1] Crawford v. Washington, 541 U.S. ___ 33

WISCONSIN SUPREME COURT
MONDAY, DECEMBER 6, 2004
2:30 p.m.

01-3105 Lamar Central Outdoor, Inc. v. Board of Zoning Appeals

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a ruling of the Milwaukee County Circuit Court, Judge David A. Hansher presiding.

This case involves a billboard on North 12th Street, near the I-43 interchange in Milwaukee. The Wisconsin Supreme Court will determine whether the Zoning Board of Appeals' ruling that denied a variance for a taller billboard was valid. At issue is the lack of a record setting forth the board's reasons for denying the appeal.

Here is the background: Lamar Central Outdoor, Inc. leases a piece of land on North 12th St. in Milwaukee for one of its billboards. The land is an isolated plot and highway ramps cross in front of it. The state Department of Transportation has planted trees on this land as a noise barrier and the trees have grown tall enough to interfere with the visibility of the billboard, which is 34' high – nearly the 40' maximum allowable under the zoning ordinance.

Lamar applied for a variance to raise the sign to 54 feet. To receive a variance, an applicant must demonstrate a hardship that is not purely economic. Lamar made the case that it had been a long-term tenant on that parcel, and that over the years it had steadily lost the use of the land due to the freeway construction and the trees. This had caused a hardship that could only be overcome by raising the billboard.

The Zoning Board of Appeals, after a public hearing, voted 3-2 to approve the variance; however, state law[2] requires a "super-majority" in cases such as this, and so, without four votes in favor, Lamar's variance was denied.

Lamar appealed the decision in the Milwaukee County Circuit Court but lost. The circuit court noted that the two members who voted against the variance had expressed concern that the hardship was purely economic. "A billboard's value is directly tied to its visibility," the judge said. "It was reasonable for the board to conclude a height variance for a billboard was an economic issue."

The Court of Appeals, however, saw it differently and reversed the lower court and the zoning board. The appellate court concluded that the zoning board had not provided reasons in its decision to deny the variance and that, in failing to articulate its rationale, it failed to perform its duty. The Court of Appeals directed the trial court to order the zoning board to do it over.

The zoning board now has come to the Supreme Court, arguing that the Court of Appeals imposed a duty that is not required under the law and that this new duty will impose an intolerable burden on hundreds of zoning boards and other administrative panels around the state.

The Supreme Court will clarify what a zoning board of appeal must articulate in its decisions.

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[2] Wis. Stat. § 62.23 (7) (e) (9)

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 7, 2004
9:45 a.m.

03-1463-CR State v. Jose A. Trujillo

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in the Kenosha County Circuit Court, Judge S. Michael Wilk presiding.

The case involves a question about the penalties for crimes under the state's Truth-in-Sentencing (TIS) law. The Wisconsin Supreme Court will decide whether a judge should be able to modify a sentence that was imposed under the harsher penalties of the first wave of Truth-in-Sentencing (TIS I) if it exceeds the penalties ultimately adopted by the Legislature in the second wave (TIS II).

TIS applies to crimes committed on and after Dec. 31, 1999. Under TIS, the defendant serves the full amount of time the judge imposes and is not eligible for early release through parole. Although it was not intended as a means of lengthening sentences, TIS did – in some cases – do just that. Because the Legislature adopted TIS for crimes committed on or after Dec. 31, 1999, but waited several years to adopt a new criminal code that reduced maximum sentences to reflect the fact that there would be no parole, there is a group of cases involving crimes committed between Dec. 31, 1999 and Jan. 31, 2003 known as "TIS I" that have spurred many appeals from thousands of inmates hoping to reduce their sentences to reflect the penalties that ultimately were enacted for their crimes.

Here is the background: On the night of April 28, 2002, after attending a baptism and drinking large quantities of tequila, Jose A. Trujillo broke into a Kenosha apartment and fondled a woman who lay sleeping in her bed next to her husband. Trujillo told authorities that he had been drinking all day and had no memory of the incident.

Trujillo was convicted of burglary and sexual assault and the judge sentenced him under TIS I (because the crimes were committed before Feb. 1, 2003) to eight years' confinement on the burglary charge and nine months' confinement (consecutive to the eight years) on the misdemeanor sexual assault. Trujillo also was advised that, as a Mexican citizen who came to the U.S. in 2001, he could be deported because of this conviction.

Several months after Trujillo was sentenced, TIS II was enacted and the burglary penalty dropped to a maximum of seven-and-a-half years' confinement. Trujillo filed a motion arguing that the reduced penalty was a "new factor" that should be considered, and he asked that his sentence be amended. The motion was denied and the Court of Appeals upheld this ruling, citing a 1983 Wisconsin Supreme Court case[3] that said a reduction in the maximum penalty for a crime is not a new factor that would permit reopening a case unless the Legislature makes the new penalty retroactive.

The Supreme Court will take another look at that 1983 decision and decide whether the reduced penalties enacted under TIS II constitute a new factor that trial court judges may use to modify TIS I sentences.

[3] State v. Hegwood, 113 Wis. 2d 544, 335 N.W.2d 399 (1983)

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 7, 2004
10:45 a.m.

03-1533-CR State v. David S. Stenklyft

This case bypassed the Court of Appeals, meaning that the Wisconsin Supreme Court agreed to take it directly from the trial court. It originated in Dane County, Judge Daniel R. Moeser presiding.

This case, like the other two that the Supreme Court will hear today, presents a question about the first phase of Truth-in-Sentencing (TIS I). In this case, the Court will decide whether the section of the law that gives prosecutors the power to veto an inmate's petition for sentence adjustment is constitutional.

TIS applies to crimes committed on and after Dec. 31, 1999. Under TIS, the defendant serves the full amount of time the judge imposes and is not eligible for early release through parole. Although it was not intended as a means of lengthening sentences, TIS did – in some cases – do just that. Because the Legislature adopted TIS for crimes committed on or after Dec. 31, 1999, but waited several years to adopt a new criminal code that reduced maximum sentences to reflect the fact that there would be no parole, there is a group of cases involving crimes committed between Dec. 31, 1999 and Jan. 31, 2003 known as "TIS I" that have spurred many appeals from thousands of inmates hoping to reduce their sentences to reflect the penalties that ultimately were enacted for their crimes.

This case, like most TIS appeals, involves a question of sentence adjustment. Wisconsin law[4] permits inmates who have served 85 percent of the confinement portion of their sentence for Class C, D, and E felonies and inmates who have served 75 percent of their sentence for Class F – I felonies to petition for sentence adjustment. Among the grounds for granting such a petition are: conduct in prison, participation in rehabilitation programs, status as an illegal alien who may be deported upon release, and more. Although it is well established that judges have the authority to modify previously imposed sentences based upon a new factor or upon a conclusion that the original sentence was too harsh, this statute gives prosecutors the authority to veto any petition for sentence modification.

Here is the background: On April 4, 2000, David S. Stenklyft drove with a blood-alcohol content of .314, more than three times the legal limit. He steered his truck down the wrong lane on Hy. 12/18 in Cottage Grove and crashed head-on into a car driven by Robert Evans. Evans was severely injured.

Stenklyft pleaded no contest and was convicted of causing injury by intoxicated use of a motor vehicle. He was sentenced under TIS I, which had gone into effect about three months earlier, to two-and-a-half years' confinement and five years' extended supervision.

In March 2003, Stenklyft petitioned the trial court to shorten his sentence. He argued that he had served 75 percent of his time and that he had been a model prisoner. Over the objection of the prosecutor, the trial judge granted Stenklyft's petition, releasing him from confinement two-and-a-half months early and lengthening his extended supervision accordingly. In granting the petition, the judge said:

> There are some who feel that the statute giving the prosecution absolute veto [over sentence adjustment] is unconstitutional…[I am not deciding that issue] except to say that I don't believe the district attorney can have absolute 100 percent veto over these cases.

[4] Wis. Stat. § 973.195

The prosecutor filed a motion for reconsideration, but the judge denied it, saying: “I can’t think of a reason that the law would not apply to … Mr. Stenklyft as well as anybody else sentenced under TIS I or TIS II, as long as the crime qualifies.”

The Supreme Court will decide whether the Legislature intended to give prosecutors absolute veto power over petitions for sentence modification from TIS I inmates.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 7, 2004
1:30 p.m.

03-1276-CR State v. James Hubert Tucker Jr.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a conviction in the Rock County Circuit Court, Judge Daniel T. Dillon presiding.

The case involves a question about the penalties for crimes under the state's Truth-in-Sentencing (TIS) law. The Wisconsin Supreme Court will decide whether a judge should be able to modify a sentence that was imposed under the harsher penalties of the first wave of Truth-in-Sentencing (TIS I) if it exceeds the penalties ultimately adopted by the Legislature in the second wave (TIS II). In this case, the Court will look specifically at "unclassified" offenses; that is, offenses that have not been grouped with crimes of similar severity into "Class A" and so on.

Wisconsin law[5] permits inmates who have served 85 percent of the confinement portion of their sentence for Class C, D, and E felonies and inmates who have served 75 percent of their sentence for Class F – I felonies to petition for sentence adjustment. Among the grounds for granting such a petition are: conduct in prison, participation in rehabilitation programs, status as an illegal alien who may be deported upon release, and more. The law is silent, however, on how much time a person convicted of an unclassified offense – such as the defendant in this case – must serve to be eligible for sentence modification.

Here is the background: James Hubert Tucker Jr., a Janesville resident, was found guilty in February 2002 of possession with intent to deliver five-or-fewer grams of cocaine and felony bail jumping. Because he committed the crime in August 2001, during the period in which the first wave of Truth-in-Sentencing was in force (TIS I), he was subject to maximum total penalties of 16 ¼ years' incarceration. He received nearly the maximum sentence: 15 years' incarceration and 10 years' extended supervision.

On Feb. 1, 2003, TIS II went into effect and the penalties for Tucker's crimes were reduced. The maximum total incarceration time for his crimes became 10 ½ years. Like many of the thousands of other defendants who were sentenced under TIS I, Tucker filed a motion to adjust his sentence. The trial court denied the motion, citing a 1983 Wisconsin Supreme Court case[6] that said a reduction in the maximum penalty for a crime is not a new factor that would permit reopening a case unless the Legislature makes the new penalty retroactive. The Court of Appeals affirmed this ruling.

TIS applies to crimes committed on and after Dec. 31, 1999. Under TIS, the defendant serves the full amount of time the judge imposes and is not eligible for early release through parole. Although it was not intended as a means of lengthening sentences, TIS did – in cases such as this one – do just that. Because the Legislature adopted TIS for crimes committed on or after Dec. 31, 1999, but waited several years to adopt a new criminal code that reduced maximum sentences to reflect the fact that there would be no parole, there is a group of cases involving crimes committed between Dec. 31, 1999 and Jan. 31, 2003 known as "TIS I" that have spurred many appeals from thousands of inmates hoping to reduce their sentences to reflect the penalties that ultimately were enacted for their crimes.

The Supreme Court will reconsider its 1983 ruling that said a reduction in maximum penalties is not a new factor that permits a sentence modification, and will determine how to handle cases that involve unclassified offenses.

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[5] Wis. Stat. § 973.195
[6] State v. Hegwood, 113 Wis. 2d 544, 335 N.W.2d 399 (1983)

WISCONSIN SUPREME COURT
MONDAY, DECEMBER 13, 2004
10:30 a.m.

03-1880 Anthony R. Anderson v. MSI Preferred Ins.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an order of the Barron County Circuit Court, Judge James C. Babler presiding.

This case involves an injured person who received a $25,000 settlement and then had to give all but $2,400 to lawyers. The Supreme Court will decide whether Wisconsin law requires an injured person to reimburse all attorney fees and costs claimed by a worker's compensation insurance carrier regardless of whether the attorney provided any benefit to the injured employee.

Here is the background: Anthony R. Anderson was injured in a car accident while working. Shawn Jones was at fault. Jones had an insurance policy through Acceptance Insurance Company with a limit of $25,000.

Anderson's employer had a worker's compensation policy through Accident Fund Insurance Co. Accident Fund paid worker's compensation benefits to Anderson and then obtained a subrogation lien on any settlement that Anderson might collect.

Anderson sued Jones but did not notify Accident Fund of the lawsuit although state law[7] requires notification. The same law provides a formula for distributing the proceeds in a worker's compensation case in which another individual (a third party) has caused the injury. At some point, Accident Fund learned of the litigation and filed a motion seeking to recover its "reasonable cost of collection" – which it estimated at $7,500. Accident Fund's work on the settlement between Anderson and Jones consisted of sending a Milwaukee lawyer to attend a mediation session in Eau Claire. At that session, Anderson's privately hired attorney (working on a one-third contingency fee basis) also appeared and Anderson reached an agreement with Jones' insurer to settle for the $25,000 policy limit.

Anderson objected to paying Accident Fund $7,500 to reimburse its legal fees when – according to Anderson – his worker's compensation benefits paid by Accident Fund amounted to a total of $8,500. Accident Fund says Anderson was paid more in benefits than he is acknowledging.

The circuit court ultimately reviewed the formula for reimbursing the lawyers and insurance company from the $25,000 settlement and agreed to allow Accident Fund to collect $7,500 and Anderson's attorney to collect her one-third. Anderson ultimately was left with $2,400 of the $25,000 settlement.

Anderson appealed, challenging the reasonableness of Accident Fund's fees. The Court of Appeals determined that this was the trial court's call to make, and that it would defer to the trial court's decision that the record supported the payment of the $7,500.

Anderson now has come to the Supreme Court, which will determine whether the law permits a worker's compensation carrier to recover attorney fees regardless of whether the attorney provided any benefit to the injured employee.

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[7] Wis. Stat. § 102.29

WISCONSIN SUPREME COURT
MONDAY, DECEMBER 13, 2004
1:30 p.m.

03-0327 John D. Hess v. Juan Fernandez III, M.D.

This is a certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Marathon County Circuit Court, Reserve Judge Thomas S. Williams presiding.

In this case, the Supreme Court will decide whether the state law that sets standards for mental health services provided by a county at public expense also applies to services provided to private-pay clients by their mental health providers.

State law[8] protects the rights of patients who are receiving publicly funded mental health care. The law provides that every patient has "…a right to receive prompt and adequate treatment…." and permits a patient whose rights are violated to sue the provider as well as the government entity that violated the right and to collect damages and costs and reasonable actual attorney fees. The patient involved in this current case argues that this law enables her to recover costs and attorney fees (which will exceed $1,000,000) while the doctor maintains that the law only permits this when the county has provided the treatment.

Here is the background: Joan Hess sued her psychiatrist, Juan Fernandez III, M.D., alleging that he had implanted false "recovered memories" that had caused her substantial, ongoing injury. A jury concluded that Fernandez had been negligent. After that verdict, Hess argued that she had been denied the right to "prompt and adequate treatment" under the law and therefore was entitled to costs and attorney fees. The court agreed, awarding Hess nearly $1,000,000 to cover these costs/fees.

Fernandez appealed, pointing out that, in discussing "prompt and adequate treatment," the statute makes reference to the "county board of supervisors" providing the care through the appropriation of public funds. He argues that this indicates the Legislature intended this law only to apply to public care. The Court of Appeals, as noted, certified this case to the Supreme Court.

The Supreme Court will decide whether the state law in question permits private-pay psychiatric patients to recover costs and attorney fees and, if so, whether the individual provider, the provider's employer, or the county may be held liable. The Wisconsin Patients Compensation Fund joins Fernandez as a co-appellant in this case.

[8] Wis. Stat. § 51.61 (7) (a)

WISCONSIN SUPREME COURT
MONDAY, DECEMBER 13, 2004
2:30 p.m.

03-1419 State v. Richard A. Brown

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed an order of the Milwaukee County Circuit Court, Judge John A. Franke presiding.

This case involves a man who was found to be a sexually violent person and detained past his prison release date for psychiatric treatment under the state's so-called sexual predator law.[9] The question before the Supreme Court is whether a circuit court is permitted to rely upon evidence from a psychologist's written report in denying supervised release, or whether actual testimony from the psychologist is required.

Here is the background: In 1988, Richard A. Brown, then 16, was found delinquent for sexually assaulting two girls who lived in his neighborhood. He was placed in a treatment center until March 1990. During his time there, it came to light that he also had been assaulting his three sisters.

He was released and, in 1993, was convicted of second-degree sexual assault of a child and incest with a child and sentenced to 40 months in prison. While in prison, he was prosecuted for the 1990 sexual assault of a runaway girl and given five years' probation. In 1995, he reached his mandatory release date and was sent to the Wisconsin Resource Center, a locked treatment facility for sexually violent offenders. In 1998, he was formally committed for in-patient psychiatric treatment as a sexual predator.

In April 2002, Brown filed a petition seeking supervised release. The circuit court appointed a psychologist, Michael Kotkin, to conduct an examination of Brown and file a report. Kotkin prepared a report in August 2002 indicating that Brown was on a positive track and might be a good candidate for supervised release in the future. Kotkin provided Brown's attorney with a copy of the report but failed to file the report with the court.

A month later, a different psychologist, David Warner, examined Brown and produced a more favorable report on him, recommending that he be considered for supervised release. Warner filed his report with the court. The State then requested that the judge order the first psychologist – Kotkin – to file his report. Over Brown's objection, the judge did so.

At the hearing, Warner was present and offered testimony but Kotkin was not. The judge admitted Kotkin's report into evidence over objections from Brown, who argued that this violated his constitutional right of confrontation and that the report was inadmissible hearsay.

The judge ultimately determined that Brown was not a good candidate for supervised release and denied his motion. The Court of Appeals affirmed this ruling.

The Supreme Court will determine whether Brown should be given a new hearing.

[9] Wis. Stat. Ch. 980

TUESDAY, DECEMBER 14, 2004
9:45 a.m.

03-0979-FT Gary J. Howell v. Orrin Denomie

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a judgment of the Trempealeau County Circuit Court, Judge John A. Damon presiding.

In this case, the Wisconsin Supreme Court will clarify the difference between a lawsuit based upon weak or strained arguments and one that is truly frivolous. A person who brings a frivolous court action may be fined and forced to pay the other side's court costs and legal fees.

The Supreme Court in March 2004 heard a case that raised the same question and reached a tie vote because then-Justice Diane S. Sykes did not participate. A tie vote permits the lower court ruling to stand. In that case, Justices Jon P. Wilcox, N. Patrick Crooks, and David Prosser Jr. would have affirmed the finding by both lower courts that the action was frivolous, while Chief Justice Shirley S. Abrahamson and Justices Ann Walsh Bradley and Patience Drake Roggensack would have found that the action was not frivolous. Since then, Sykes has left the Court and Justice Louis B. Butler Jr. has joined it.

The current case arises out of a good turn that did not turn out well. Orrin Denomie is an elderly man who was a good friend of Gary J. Howell's father. Howell wanted to buy a house but was unable to come up with financing. There are two takes on what happened next. Denomie says he offered to buy the house for Howell and rent it to him until he could come up with the purchase price, while Howell maintains that Denomie agreed to loan him $67,000 to buy the house. In any case, Denomie came up with a check, and a title insurance company prepared a deed and mortgage. A closing was set up at a local bank with both Denomie and Howell present. Denomie – who alleges that he thought he was purchasing the property – was not asked to sign anything. He left the bank believing, he says, that he had bought the house. Howell, on the other hand, believed that *he* had bought the house.

After the closing, Howell made monthly payments to Denomie, which Denomie noted on his tax returns as "rent." Eventually, Howell asked Denomie for a "satisfaction of mortgage," which is a document that is given to a borrower after a mortgage has been paid in full. Denomie apparently did not provide this, and Howell took him to court. The trial court judge found Howell credible and Denomie "confused and not credible." The judge concluded that Denomie's answer to Howell claim, and Denomie's counterclaim, were frivolous. He awarded Howell the satisfaction of mortgage, $2,267 in damages, $5,245.24 in legal fees, and a $2,000 penalty.

Denomie appealed, and the Court of Appeals affirmed the circuit court.

The Supreme Court will decide whether a finding of frivolousness was appropriate in this case, and will clarify where the line is drawn between a weak case and one that is truly frivolous.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 14, 2004
10:45 a.m.

03-2027 Klover E. Lagerstrom v. Myrtle Werth Hospital

This is a certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Dunn County Circuit Court, Judge William C. Stewart presiding.

This is a medical malpractice case. The question before the Supreme Court is whether a legal doctrine known as the "collateral source rule" is abrogated (cancelled) by a state law[10] and, if so, whether that law violates the constitution.

The collateral source rule exists to ensure that a tortfeasor (a wrongdoer) is not let off the hook for payment simply because other sources – such as a health-insurance provider – have covered the costs of the injured person's bills. This rule says that an injured person is entitled to be reimbursed by the tortfeasor for medical bills even if those bills already have been paid by a health insurance plan and that the victim is entitled to similar reimbursement for lost wages even if s/he has sick days available through an employer.

The law that the plaintiffs argue unconstitutionally cancels this rule permits a jury to hear evidence of compensation received from sources other than the defendant (the tortfeasor). While the law does not require a reduction in any malpractice award, it does allow the jury to reduce the award by the amount collected from other sources.

In this particular medical malpractice case, the defendants – Myrtle Werth Hospital and Mayo Health System – used this law to present evidence to the jury that a portion of the deceased victim's treatment was paid by a combination of Medicare, medical provider write-offs, and private insurance. The jury ended up awarding the victim's wife, Klover Lagerstrom, $755 for medical expenses and nothing for funeral expenses.

Klover Lagerstrom sued after the death of her husband Vance. Vance was treated at Myrtle Werth Hospital after he broke his hip. Negligent medical personnel inserted a feeding tube into his lung and deposited a mixture of Ensure and water. Twelve weeks later, Vance died. Although the cause of death was disputed, the death certificate indicates that he died of pneumonia.

After receiving the jury award of $755, Klover went to the Court of Appeals, which, as noted, certified this case to the Supreme Court.

The Supreme Court will determine whether the law, in permitting but not requiring juries to reduce damage awards, violates a plaintiff's right to equal protection and due process by encouraging arbitrary jury awards, or whether, as the defendants argue, the law establishes a good public policy: controlling windfall recoveries by plaintiffs.

[10] Wis. Stat. § 893.55 (7)

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 14, 2004
1:30 p.m.

03-0862 Raul J. Walters v. National Properties, LLC

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Walworth County Circuit Court, Judge John R. Race presiding.

This case involves a gas station/convenience store that was evicted after it did not pay its rent on time. The Supreme Court will determine whether the time to make good on overdue rent was the time indicated in a notice sent by the landlord or the time set out in the lease agreement.

Here is the background: In 1993, National Properties, LLC, a Kenosha-based company, entered into a 10-year lease with Raul J. Walters' Missouri-based Lake Geneva Centre. National operated a gas station and convenience store on the Walworth County property that it leased from Walters. The lease required National to pay the rent on the first day of each month, provide annual and monthly sales information, and pay the real estate taxes. The lease stated that National would have 30 days from the date of the mailing of a default notice to make good on overdue rent before eviction proceedings would begin.

National missed its Sept. 1, 2002 rent payment. On Sept. 13, 2002, Walters sent a notice requiring National to pay the overdue rent and delinquent 2001 real estate taxes. The notice warned that the rent must be paid by 30 days from the service of the notice or eviction proceedings would begin. National received the notice on Sept. 16, 2002 and mailed the check on Oct. 15, 2002 – 29 days after it had received the notice but 32 days after the notice was mailed.

Walters took National Properties to court seeking to evict. The court concluded that Walters' notice to National Properties was effective on the date of mailing, and therefore National Properties was in default. The state law[11] that governs leases that are longer than one year, however, states:

> …in case of failure to pay rent, all rent due must be paid on or before the date specified in the notice. (emphasis added)

National went to the Court of Appeals, arguing that it had mailed the rent check within 30 days of receiving the notice. The Court of Appeals, however, affirmed the trial court, concluding that the lease provisions, rather than the notice that was mailed, controlled the period for making good on the rent.

The Supreme Court will clarify whether the time to "cure" a rent default is the time specified in the notice, as the statute seems to indicate, or in the lease, as the lower courts found.

[11] Wis. Stat. § 704.17 (3) (a)